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PETRA A. MARTINEZ

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PETRA A. MARTINEZ,

Plaintiff,

v.

AMERICA'S WHOLESALE LENDER, *et al.*

Defendants.

CASE NO.: 3-09-CIV-5630WHA

PLAINTIFFS OBJECTIONS TO
DEFENDANTS' EVIDENCE OFFERED IN
SUPPORT OF THEIR JOINT MOTION FOR
SUMMARY JUDGMENT

*[Filed Concurrently with Plaintiff's
Opposition to Defendant's Motion for
Summary Judgment]*

Department: 450 Golden Gate Ave.
San Francisco, CA 94102
Courtroom 9, 19th Floor
Judge: Hon. William Alsup
Date: March 4, 2010
Time: 8:00 a.m.

Plaintiff hereby makes the following objections to Defendant's Evidence:

I. Objections to the Declaration of Michael Cerchio In Support Of Defendants' Motion

For Summary Judgment.

Objections are made on the following grounds:

1 1) The declarant lacks personal knowledge of any matters therein. The declarant states that
2 his "familiarity" with the facts is based on a "review of BNY's records". Paragraph 1, Lines 7-8.
3 Because personal knowledge is required for factual evidence to be admissible, the entire declaration
4 is inadmissible. Personal knowledge means "it is more probably true than not true that the witness
5 had the capacity and opportunity to observe through his senses and record a relevant sense
6 impression, did in fact observe, record and can now recollect the relevant sense impression, and
7 finally can comprehend questions and narrate the relevant sense impression." *See* Advisory
8 Committee's Note to Rule 602. A review of records does not qualify as personal knowledge, and
9 the objection should be sustained.
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13 2) The matters testified to are hearsay. The declarant purports to testify about the truth of
14 documents to which he does not testify having been a party. To the extent that business records,
15 which these purport to be, are admissible under FRE 803(6), the business records exception does
16 not apply here, because FRE 803(6) requires the declarant to lay a foundation, which was not done
17 here. The objection should be sustained.
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20 3) Best Evidence Rule. The declarant seeks to enter evidence about the existence of
21 numerous written agreements, in Paragraphs 2, 3, 5, and 6, *without having attached any of the*
22 *purported agreements*. This does not satisfy the requirements of FRE 1002, 1003, 1004, or 1005,
23 or the statute of frauds.
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25 More importantly, it is in direct defiance of the court's order to "lay out in the documents
26 why it is that ...this was all done perfectly right and who has the original paper ... just trace it
27 through. You ought to be able to trace it through, who has the original note and all that."
28

29 Rather than comply with the court's order, the Defendants have submitted a non-compliant
30 declaration which contains nothing but inadmissible testimony as to the existence of written

1 agreements, and is therefore frivolous. Plaintiff's objection to the declaration of Michael Cerchio
 2 should be sustained.

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 4 **II. Objections To The Declaration Of George Merziotis In Support Of Defendants'**
 5 **Motion For Summary Judgment.**

6 1. The Declarant's testimony is irrelevant.

7 a. George Merziotis testifies that he is a "Litigation Specialist in the Foreclosure Bankruptcy
 8 and Risk Management department at BA Home Loans Servicing LP." Paragraph 1, lines 1-2. He
 9 states that he "reviewed the internal BAC home Loans Servicing files containing documents
 10 regarding the Loan." *id* at lines 8-12.

11 However Mr. Merziotis, Mr. Cerchio, Ms. Eva Tapia (see lines 22-23 of her declaration
 12 indicating that Countrywide Home Loans Servicing LP contacted Plaintiff prior to foreclosure), or
 13 Defense Attorney Kalama Lui Kwan, fail to establish ANY CONNECTION WHATSOEVER of
 14 George Merziotis or BAC Home Loans Servicing to the instant case. There is no foundation of
 15 relevance for this testimony.

16 b. Additionally, in a separate relevance objection under 104(b), the matters in Mr. Merziotis'
 17 declaration are all conditionally relevant upon evidence that any of the defendants have an interest
 18 in the Note, Deed of Trust, or Subject Property. No such evidence has been admitted. *Id.*
 19 [Providing: When the relevancy of evidence depends upon the fulfillment of a condition of fact, the
 20 court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding
 21 of the fulfillment of the condition.] To the extent that Mr. Merziotis does not work for America's
 22 Wholesale Lender, a New York Corporation, his testimony is unfounded as to any records on the
 23 Plaintiff regarding her mortgage until a transfer of that mortgage has been established.

1 2. Lack of Personal Knowledge. The declarant has no apparent personal knowledge of any
 2 of the matters testified to and on that basis, Plaintiff objects to the entire declaration. Specifically,
 3 his testimony as to the corporate structure of ReconTrust Co.N,A., Countrywide Bank, FSB,
 4 Countrywide Financial Corporation, MERS, and Bank of America Corp. is without foundation and
 5 is improperly evidenced by testimony.
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7 3. Hearsay. Paragraph 3, a.-o. offers hearsay documentary evidence without any business
 8 records exception foundation.
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10 4. Improper foundation for documentary evidence. Documents require proper
 11 authentication. The documents introduced at paragraph 3 a.-o. do not satisfy the requirements of
 12 FRE 901. Especially, the existence in BAC Home Loans's records of the Uniform Loan
 13 Application, Truth in Lending Disclosure Statement, Notice of Right to Cancel, Loan Application
 14 Disclosure Acknowledgements, Amortization Schedule and Itemization of Amount Financed,
 15 Interest Only Adjustable Rate Note, Closing Instructions, Servicing Transfer Disclosure and a HUD
 16 -1 Statement are not probative whatsoever if they cannot be authenticated, because this does not
 17 show that they are legitimate copies or that Ms. Martinez recieved copies of them. Mr. Merziotis
 18 does not allege that he was there when the documents are signed or that he is familiar with Ms.
 19 Martinez's signature. How did BAC get these records to begin with? What makes him think they
 20 are authentic?
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22 Also, numerous letters in Countrywide's records addressed to Ms. Martinez, with no other
 23 knowledge that they were printed, mailed, or received has no probative value, nor authentication.
 24 The objection should be sustained.
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26 **III. Objections to the Declaration Of Kalama Lui-Kwan**

1 1. Hearsay as to Exhibits 1-6. The public records exception to the Hearsay rule provides that
2 "The contents of an official record, or of a document authorized to be recorded or filed and actually
3 recorded or filed, including data compilations in any form, if otherwise admissible, may be proved
4 by copy, certified as correct in accordance with rule 902 or testified to be correct by a witness who
5 has compared it with the original. If a copy which complies with the foregoing cannot be obtained
6 by the exercise of reasonable diligence, then other evidence of the contents may be given." Fed. R.
7 Evid. 1005.
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10 Not only do none of the documents attached to the Declaration of Kalama Lui Kwan meet
11 the requirements of 1005 or 902, but he admits to having obtained them all off of a privately held
12 online database, called docedge.com. While these documents purport to be copies of the public
13 records, no shred of authentication is before the court that would allow it to admit these into
14 evidence against the Plaintiff. They are not certified as correct, Mr. Lui Kwan can only certify that
15 the copy he submitted to the court is the same as the one he got off the Internet. Note, these copies
16 are not purportedly obtained from the county recorder's office. Docedge.com is not a public
17 official and is under no duty whatsoever to maintain correct records. No one has compared these
18 copies to a version with an original signature, and there is no "other evidence" that the documents
19 are what they purport to be. There is no evidence of reasonable diligence in the first instance which
20 would allow for "other evidence" of their authenticity besides, and the objection should be
21 sustained.
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27 2. Relevance. Under 104(b), the matters in Mr. Lui Kwan's declaration at paragraphs 5-8 are
28 conditionally relevant upon evidence that any of the defendants have an interest in the Note, Deed
29 of Trust, or Subject Property. No such evidence has been admitted. *Id.* [Providing: When the
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1 relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it
2 upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of
3 the condition.] Here, the recordation of foreclosure documents is irrelevant absent evidence of an
4 interest in the property.
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7 **Iv. Objections To The Declaration Of Eva Tapia.**

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9 1. Lack of personal knowledge. The declarant testifies that she is Vice President at
10 ReconTrust Company. She goes on to allege she is "familiar with the facts and circumstances" and
11 goes on to talk about her "understanding." She does not allege how she became familiar with any
12 of the facts testified to, nor how she came to her "understanding."
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14 For instance, she claims that Ms. Martinez defaulted on "the Loan" as of May 1, 2008,
15 which is a legal conclusion (improperly included in a declaration), without testifying as to any
16 factual material or how she became privvy to such factual material. Because ReconTrust is not
17 evidenced to be involved with the servicing of the loan, this facts is completely lacking personal
18 knowledge. It would appear, form her declaration that she heard it from MERS, as she testifies
19 (without producing any evidence of the fact) that ReconTrust was "an agent for MERS" the loan's
20 beneficiary. (Doesn't MERS itself purport to be acting solely as an agent for someone else?) She
21 testifies about "her understanding' of a MERS Board of Directors resolution appointing "all
22 employees of ReconTrust" as "assistant secretaries of MERS." Setting aside comment on the nature,
23 enforceability, or actual existence of any such resolution, the "true and correct copy" of the
24 resolution is absolutely inadmissible through this witness. It is not a public record, she is not a
25 signatory to it, she does not claim to have been present at signing, its not notarized, and is otherwise
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1 totally inadmissible. The entire declaration, and each paragraph, is similarly made without personal
2 knowledge.

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4 2. Hearsay as to Exhibits A, B, C, D, E, and G.

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6 3. Irrelevance. Under 104(b), the matters in Ms. Tapia's declaration are all conditionally relevant
7 upon evidence that any of the defendants have an interest in the Note, Deed of Trust, or Subject
8 Property. No such evidence has been admitted. *Id.* [Providing: When the relevancy of evidence
9 depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the
10 introduction of evidence sufficient to support a finding of the fulfillment of the condition.]
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13 Dated: February 11, 2010

Respectfully submitted,

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15 By: _____/S/
16 Michael Patrick Rooney, Esq.
17 Attorney for Plaintiff PETRA A. MARTINEZ
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